A

MAMASOBRI USENG

v.

PP

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FEDERAL COURT, PUTRAJAYA
ALAUDDIN MOHD SHERIFF PCA
HASHIM YUSOFF FCJ
HELILIAH MOHD YUSOF FCJ
[CRIMINAL APPEAL NO: 05-55-2010 (K)]

C

16 JUNE 2011

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in cannabis - Conviction and sentence - Appeal against - Whether there was error or misdirection by trial judge - Whether there*

D

was miscarriage of justice - Whether there was reason to interfere with findings of trial judge - Whether courts acted contrary to settled principles of justice

CRIMINAL PROCEDURE: *Appeal - Appellate court, power and duty of - Misdirection by trial court - Whether miscarriage of justice*

E

occasioned - Courts of Judicature Act 1964, s. 60(1) - Applicability of

This was an appeal against the decision of the Court of Appeal affirming the conviction and sentence imposed by the High Court against the appellant on a charge of trafficking 23,289 grammes of

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cannabis under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). Briefly, the appellant, who was driving an Isuzu pick-up truck near the Immigration Complex at Bukit Kayu Hitam, had been stopped by a customs officer, SP1. Upon inspection of the vehicle, the customs officers found one plastic package under the

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driver's seat and 23 plastic packages in a special compartment under the back of the passenger's seat all containing dried leaves suspected to be cannabis. All 24 plastic packages were sent for analysis and the chemist confirmed that they contained cannabis. The appellant herein raised these grounds of appeal (i) the learned

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trial judge and the Court of Appeal failed to appreciate the 'double presumption' point; (ii) the learned trial judge misdirected himself on the issue of burden of proof required of the defence and (iii) it was not proper for the Court of Appeal to apply the proviso to s. 60 of the Courts of Judicature Act 1964 ('the CJA').

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Held (dismissing the appeal; affirming conviction and sentence)

Per Hashim Yusoff FCJ delivering the judgment of the court:

(1) Although the Court of Appeal had mentioned in its grounds of judgment that 'notwithstanding the imbroglio of the usage of the statutory presumptions' by the trial judge, it was still of the opinion that there was no error or misdirection in view of the overwhelming evidence. Based on the overwhelming evidence, the Court of Appeal had not erred in applying the proviso to s. 60 of the CJA. There was nothing wrong with the approach taken by the trial judge, as well as that of the Court of Appeal on the issue of burden of proof required of the defence. The appellant was required to raise a 'reasonable doubt on a balance of probabilities'. The trial judge had properly referred to the case of *Muhamed Radhi Yaakob*. (paras 12 & 17)

(2) The defence was merely a denial regarding any knowledge of the offending 24 packages of drugs found in the Isuzu pick-up. The appellant's defence of trying to push the blame on one person called "Mat" as the person who was the owner of the pick up and who had lent it to him on the material date whereby he had driven the pick-up from Hatyai together with 'Mat', but 'Mat' had got off the said vehicle before the Malaysian border at Danok was also rejected as an afterthought. (para 18)

(3) The learned trial judge came to the right conclusion that the appellant knew that he was carrying the dangerous drugs in the pick-up because he became nervous and panicky and could not drive the said vehicle properly when he was stopped by the Customs Officer (SP1). The fact that the appellant had in his right trousers pocket the key and a remote control which when pressed, triggered a sound "ketak" from the direction where the special compartment was located had led to the discovery of the offending drugs hidden therein by the Customs Officers upon investigation. (para 19)

(4) There was no miscarriage of justice in this instant appeal. There was no reason to interfere with the findings made by the trial judge. Nor had the Court of Appeal acted contrary to the settled principles of justice. (para 20)

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Ini adalah rayuan terhadap keputusan Mahkamah Rayuan mengesahkan sabitan dan hukuman yang dikenakan oleh Mahkamah Tinggi ke atas perayu atas tuduhan pengedaran 23,289 B gram kanabis di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Secara ringkas, perayu, yang telah memandu sebuah trak pick-up berdekatan dengan Kompleks Imigresen, Bukit Kayu Hitam, telah ditahan oleh seorang pegawai kastam, SP1. Setelah memeriksa kereta tersebut, pegawai-pegawai kastam mendapati satu C paket plastik di bawah kerusi pemandu dan 23 paket plastik di dalam satu kompartmen khas di bawah tempat duduk penumpang belakang yang semuanya mengandungi daun-daun kering yang disyaki kanabis. Kesemua-semua 24 paket plastik dihantar untuk analisis dan ahli kimia mengesahkan bahawa ia mengandungi D kanabis. Perayu membangkitkan beberapa alasan rayuan (i) bahawa hakim bicara dan Mahkamah Rayuan gagal menimbangkan persoalan 'anggapan berganda'; (ii) hakim bicara telah tersalah arah atas isu beban membuktikan yang perlu dilakukan oleh pihak pembelaan dan (iii) ia tidak wajar untuk Mahkamah Rayuan E menggunapakai proviso kepada s. 60 Akta Mahkamah Kehakiman 1964 ('AMK').

Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman)

F **Oleh Hashim Yusoff HMP menyampaikan penghakiman mahkamah:**

(1) Walaupun Mahkamah Rayuan telah menyebut dalam alasan penghakiman bahawa 'terdapat kekacauan penggunaan anggapan statutori' oleh hakim bicara, ia masih berpendapat G bahawa tidak terdapat kesalahan atau salah arah memandangkan keterangan yang ada adalah kukuh. Berdasarkan keterangan yang kukuh itu, Mahkamah Rayuan tidak salah apabila menggunapakai proviso kepada s. 60 AMK. Pendekatan yang diambil oleh hakim dan Mahkamah Rayuan H tidak salah mengenai isu beban membuktikan yang dikenakan ke atas pihak pembelaan. Perayu diperlukan untuk membangkitkan 'keraguan munasabah atas satu imbangan kebarangkalian'. Hakim bicara telah dengan betul merujuk kepada kes *Muhamed Radhi Yaakob*.

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(2) Pembelaan hanyalah satu penafian mengenai sebarang pengetahuan berhubungan 24 bungkusan dadah-dadah berbahaya yang ditemui di dalam pick-up Isuzu. Pembelaan

perayu yang cuba menuduh seseorang bernama 'Mat' sebagai pemilik pick-up tersebut dan yang telah meminjamkannya pada tarikh material dan mereka telah memandu ke Hatyai bersama-sama, tetapi 'Mat' telah turun dari kenderaan tersebut sebelum Sempadan Malaysia di Danok telah ditolak sebagai satu rekaan.

(3) Hakim bicara telah membuat kesimpulan yang betul bahawa perayu tahu yang beliau sedang membawa dadah-dadah berbahaya di dalam pick-up sebab beliau memang kelihatan gementar dan cemas dan tidak dapat memandu kereta dengan betul apabila ditahan oleh Pegawai Kastam (SP1). Fakta bahawa perayu mempunyai kunci dan alat kawalan jauh di dalam poket kanan seluarnya yang jika ditekan, kedengaran bunyi 'ketat' dari arah di mana kompartmen khas dijumpai telah membawa kepada penemuan dadah-dadah berbahaya yang tersembunyi di dalamnya oleh pegawai-pegawai kastam atas siasatan.

(4) Tiada salah laksana keadilan di dalam rayuan ini. Tiada sebab timbul untuk campurtangan dengan dapatan-dapatan yang dibuat hakim bicara. Mahkamah Rayuan juga tidak bertindak bertentangan dengan prinsip-prinsip keadilan yang tetap.

Case(s) referred to:
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
Tunde Apatira & Ors v. PP [2001] 1 CLJ 381 FC ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 60
Dangerous Drugs Act 1952, ss. 37(d), (da)(vi), (h), 39B(1)(a)

For the appellant - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the respondent - Muhamad Abazafree Mohd Abbas (Lailawati Ali with him) DPP; AG's Chambers

[Appeal from Court of Appeal; Criminal Appeal No: K-05-56-2006]

Reported by Suhainah Wahiduddin

A

JUDGMENT

Hashim Yusoff FCJ:

[1] This is an appeal against the decision of the Court of Appeal which had affirmed the conviction and sentence imposed by the High Court against the appellant on a charge of trafficking 23,829 grammes of Cannabis under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act").

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Facts Of The Case

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[2] On 8 November 2001, the appellant, a Thai national, had driven an Isuzu pick-up bearing registration number XF 1369 PTN from Thailand to the Immigration Complex at Bukit Kayu Hitam as the appellant wanted to drive to Kuala Lumpur. The appellant was the sole occupant of the vehicle. The appellant was then stopped by SP1, a customs officer, who wanted to conduct a random search on the vehicle. SP1 identified himself and when the pick-up stopped SP1 said that the appellant looked worried and was in a state of panic. SP1 then asked the appellant to move his pick-up forward and reverse it to the green lane for inspection. The appellant was able to reverse the vehicle only after 3 or 4 attempts.

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[3] Upon inspection of the vehicle by SP1 and two other customs officers SP1 found from under the driver's seat a plastic package containing dried leaves suspected to be Cannabis. SP1 then put it back. From the right trousers pocket of the appellant, SP1 found a key with a remote control and on being queried the appellant said it was meant for another vehicle. However each time the remote was pressed there would be a sound of "ketat" coming from the back passenger's seat. Later the pick-up was brought to the stor pencegah for a more detailed examination. The subsequent examination of the pick-up revealed that there was a special compartment under the back passenger's seat. There were three layers of covering. The first covering which was made of wood was covered with red rubber cloth and could be opened with the automatic remote. The other two coverings were made of iron sheets. When the three coverings were opened SP1 found 23 plastic packages (exhs. P11 - P23) all containing dried leaves suspected to be Cannabis.

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[4] SP3, a mechanical engineer with the Public Works Department, who examined the pick-up at the request of the Customs Department confirmed the petrol tank had been modified in that the tank was divided into two compartments using an iron plate.

[5] All the 24 plastic packages were sent for analysis and the chemist confirmed that they contained cannabis. The total weight was 23,829 grammes.

[6] Learned counsel for the appellant raised three grounds of appeal:

(i) The learned trial judge and the Court of Appeal failed to appreciate the 'double presumption' point;

(ii) The learned trial judge misdirected himself on the issue of burden of proof required of the defence;

(iii) It was not proper for the Court of Appeal to apply the proviso to s. 60 of the Courts of Judicature Act 1964 ("the CJA").

(i) And (iii) The Double Presumption Point

And Section 60 Of The CJA

[7] We will deal with these two issues first as they are quite closely related.

[8] Learned counsel for the appellant submitted that the learned trial judge had wrongfully used the double presumption under s. 37(d) and (da) of the Dangerous Drugs Act 1952 ("the Act") read together as can be seen from his grounds of judgment (at p. 17 of the Appeal Record) wherein the learned judge says "Saya berpuas hati bahawa selepas kes pendakwaan ditutup pihak pendakwaan telah membuktikan kes terhadap tertuduh dibawah seksyen 39B(1)(a) dengan mengguna anggapan dibawah subseksyen-subseksyen (d), (da)(vi) dan (h) seksyen 37 Akta. Tertuduh oleh yang demikian dipanggil membela diri keatas pertuduhan yang dihadapi." Following the case of *Muhammed Hassan v. PP* [1998] 2 CLJ 170, it was submitted that the learned trial judge had erred in law in using the presumption of possession under s. 37(d) of the Act to invoke the presumption of trafficking under s. 37(da) thereof.

[9] It was also submitted that the Court of Appeal had not considered this issue in its grounds of judgment. It therefore amounts to a serious misdirection by way of non-direction. What the Court of Appeal had referred to in its grounds of judgment were the presumptions under s. 37(d) and 37(h) of the Act, instead.

[10] The learned DPP however replied that the Court of Appeal had considered the double presumption issue. But having evaluated the totality of the evidence the Court of Appeal was satisfied that "notwithstanding the imbroglio of the usage of the statutory presumptions and having regard to the overwhelming nature of the case for the prosecution, the learned trial judge would have and indeed come to the same decision. In short, on the totality of the evidence the learned trial judge had made a correct decision in convicting the appellant. The decision was based on cogent and admissible evidence and not on ethereal matters. The misdirection if any (of which we are of the opinion that there was none) had not occasioned any miscarriage of justice" (see p. 13 of the grounds of judgment of the Court of Appeal).

[11] The effect of the double presumption issue is closely connected to the application of s. 60 of the CJA.

[12] We agree with the learned DPP that although the Court of Appeal did mention in its grounds of judgment that "notwithstanding the imbroglio of the usage of the statutory presumptions" (by the learned trial judge), it still was of the opinion that there was no error or misdirection in view of the overwhelming evidence based on the following findings of facts by the learned trial judge:

> Daripada keterangan pihak pendakwaan terdapat beberapa perkara yang jelas telah dibuktikan:
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> 1. Tertuduh merupakan pemandu pick-up berkenaan semasa ditahan oleh SP1 tanpa lain-lain penumpang dalamnya;
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> 2. Apabila ditahan dan beritahu oleh SP1 bahawa SP1 adalah pegawai Jabatan Kastam, tertuduh menjadi gelisah dan kelam-kabut;
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> 3. Apabila diminta menggerakkan ke hadapan dan mengundurkan pick-up ke tempat pemeriksaan pertama tertuduh tiba-tiba tidak dapat memandu pick-up berkenaan dengan baik dan perlu cuba tiga atau empat kali;

4. Di tempat pemeriksaan pertama SP1 telah dapati satu bungkusan mengandungi dadah berbahaya di bawah kerusi pemandu;

5. SP1 kemudian dapati satu kunci bersama remote daripada poket kanan seluar tertuduh dan apabila ditanya oleh SP1, "ini kunci apa?", tertuduh menjawab "kunci kereta lain";

6. Apabila SP1 tekan remote berkenaan SP1 mendengar bunyi "ketat" di bahagian tempat duduk penumpang belakang pick-up berkenaan tiap-tiap kali remote ditekan;

7. Pemeriksaan khusus di tempat duduk berkenaan telah menunjukkan bahawa ada compartment khas dibina dalam tangki minyak petrol pick-up yang tersorok daripada pandangan dengan lapisan pertama kayu disalut dengan kain getah warna merah, lapisan-lapisan kedua dan ketiga yang terdapat kesan-kesan tangki tersebut dipotong;

8. Tempat 23 bungkusan dadah dijumpai jelas diperbuat dengan khas untuk menyorok dadah berkenaan; dan

9. Kesemua bahan-bahan tumbuhan dalam 24 bungkusan yang dijumpai disahkan sebagai genus cannabis.

These findings do have a cumulative effect on the case against the appellant. Such findings carry with it a snow-ball effect that amplified and constitute sufficient evidence to convict the appellant, without having to resort to any of the above mentioned presumptions.

[13] We also find that based on the above overwhelming evidence, the Court of Appeal had not erred in applying the proviso to s. 60 of the CJA which provides:

> Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

[14] This power of the Court of Appeal has been explained by this court in the case of *Tunde Apatira & Ors v. PP* [2001] 1 CLJ 381, at p. 390 as follows:

> As a general rule this court will, in the normal course of events, quash a conviction where there has been a misdirection. Exceptionally, a conviction will be upheld despite a misdirection where this court is satisfied that a reasonable tribunal would have convicted the accused on the available evidence on a proper

direction. The decision of this court in *Alcontara a/l Ambross Anthony v. Public Prosecutor* [1996] 1 CLJ 705 exemplifies the general rule, while that in *Khoo Hi Chiang v. Public Prosecutor* [1994] 2 CLJ 151 illustrates the exception.

(ii) The Burden Of Proof Required Of The Defence

[15] Learned counsel for the appellant submitted that the Court of Appeal had erred when it failed to recognize that to require the appellant to raise 'a reasonable doubt on a balance of probabilities' was so fundamentally wrong in law as it unjustly imposed a higher burden on the appellant.

[16] Reference was made to the grounds of judgment of the learned trial judge at p. 100 of the Appeal Record wherein his Lordship said:

> Bagi kes pembelaan, beban tertuduh di sisi undang-undang adalah untuk membangkit apa-apa keraguan yang munasabah atas imbangan kebarangkalian terhadap kes pihak pendakwaan. (*Muhamad Radhi bin Yaakob v. PP* [1991] 3 MLJ 169 dan *Mat v. PP* [1963] MLJ 263.

This view of the learned trial judge was agreed upon by the Court of Appeal.

[17] With respect, we do not find anything wrong with the approach taken by the learned trial judge, as well as that of the Court of Appeal. The learned trial judge had properly referred to the case of *Mohamad Radhi Yaakob v. PP*, *supra* wherein this court *inter alia* held:

> Held:
>
> (2) where the prosecution relies on available statutory presumptions to prove one or more of the essential ingredients of the charge, the particular burden of proof, as opposed to the general burden, shifts to the defence to rebut such presumptions on the balance of probabilities which from the defence point of view is heavier than the burden of casting a reasonable doubt but it is certainly lighter than the burden of the prosecution to prove beyond reasonable doubt.

[18] In the instant appeal, the learned trial judge found that the defence was merely a denial regarding any knowledge of the offending 24 packages of drugs found in the Isuzu pick-up. The appellant's defence of trying to push the blame on one person

called 'Mat' as the person who was the owner of the pick-up and who had lent it to him on the material date whereby he had driven the pick-up from Hatyai together with 'Mat', but 'Mat' had got off the said vehicle before the Malaysian border at Danok was also rejected by the learned trial judge as an afterthought.

[19] The learned trial judge also rightly came to the conclusion that the appellant knew that he was carrying the dangerous drugs in the pick-up because he became nervous and panicky and could not drive the said vehicle properly when he was stopped by the Custom Officer (SP1). The fact that the appellant had in his right trousers pocket the key and a remote control which when pressed, triggered a sound "ketak" from the direction where the special compartment was located had led to the discovery of the offending drugs hidden therein by the customs officer upon investigation.

[20] In the final analysis, we could not find any miscarriage of justice in this instant appeal. We had no reason to interfere with the findings made by the learned trial judge. Nor had the Court of Appeal acted contrary to the settled principles of justice.

[21] For the above reasons, we therefore dismiss the appeal. The conviction and sentence meted out by the trial judge are hereby affirmed.